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No. ____

IN THE

Supreme Court of the United States

OCTOBER 1980 TERM

ROBERT E. KURZIUS, INC., ROBERT E. KURZIUS, ANNEMARIE KURZIUS, and ADELE S. KURZIUS,

Petitioners,

—against—

INCORPORATED VILLAGE OF UPPER BROOKVILLE,

Respondent.

PETITION FOR WRIT OF CERTIORARI TO THE COURT OF APPEALS OF THE STATE OF NEW YORK

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QUESTION PRESENTED

Whether respondent's rezoning of the subject property so that a single family residence may only be built on a minimum lot size of five acres is unconstitutional because: (1) it is exclusionary in purpose and in fact; and (2) it is an impermissible exercise of the police power, even though it is allegedly in furtherance of preservation of open space.

The Court of Appeals of the State of New York, relying upon Agins v. City of Tiburon, ___ U.S.___, 100 S. Ct. 2138, held that respondent's five acre minimum lot zoning was constitutional. This holding is contrary to: (1) the determinations of the Supreme Court of Pennsylvania which held that three and four acre minimum lot zoning is

unconstitutional; (2) the determination of the Supreme Court of Virginia which held that two acre minimum lot zoning was unconstitutional; and (3) strong dicta of the Maryland Court of Appeals and the United States Court of Appeals for the First Circuit which seriously questioned the validity as a permanent zone of five acre and six acre minimum lot zoning respectively.

Accordingly, it is submitted that this Court should grant certiorari in order to settle the conflict between the New York Court of Appeals and: (1) the aforesaid State Courts of last resort (Pennsylvania, Virginia, Maryland) and (2) the United States Court of Appeals for the First Circuit.

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SUPREME COURT OF THE UNITED STATES

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- -X

OPINION BELOW

The Court of Appeals of the State of New York rendered an opinion which is reported at 51 NY2d 338, attached hereto as Appendix (p. A-1 - A-10)

JURISDICTION

1. The remittitur of the Court of Appeals of the State of New York which is sought to be reviewed by this Court was made and entered in the office of the clerk of that Court on November 20, 1980

and the opinion of said Court is attached as an Appendix (P. A-25).

2. No application has been made to said Court for a rehearing or reargument and no extension of time within which to petition for certiorari has been granted.

3. Jurisdiction of the United States Supreme Court to review the order of the New York Court of Appeals is confered by 28 U.S.C. §1257, subdiv. 3, and 28 U.S.C. §2101.

CONSTITUTIONAL PROVISIONS INVOLVED

AMENDMENT 5

No person ... shall be deprived of life, liberty, or property, without due process of law; nor shall private

property be taken without just compensation.

AMENDMENT 14 (1)

No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws.

FACTS DEVELOPED AT TRIAL

In 1960 the rulers of the Incorporated Village of Upper Brookville ("Village") determined that it was necessary to rezone portions of the Village, all of which had been zoned for two acre development since the incorporation of the Village in 1932 (46).* To accomplish this, they hired a planner, Francis Dodd McHugh, to prepare a comprehensive plan pursuant to which the zoning ordinance would be developed (1193).

At numerous private meetings with the major landowners, Mr. McHugh was told how these owners desired to channel the future of the Village (1342). By October, 1960, he had incorporated these aims into the "Comprehensive Master Plan"

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* Unless otherwise indicated, numbers in parentheses refer to pages in the Record on Appeal before the New York Court of Appeals.

(1369), which recommend the establishment of five acre and two acre zones in the Village (Ex. 41). In December, 1960 the new ordinance was passed, officially establishing the two zones (Ex. 24).

In 1968, the corporate plaintiff acquired 60 acres of land in the Village, 10 acres of which were zoned for two acre development and 50 acres for five acre development (92, 100). It obtained approval for subdivision of the entire parcel (102). Between 1969 and 1975, all of the two acre lots were sold and homes were constructed thereon (117).

To this date, none of the five acre lots has been sold. However, two of those lots are occupied by homes, one in which plaintiff Robert E. Kurzius and his family reside, and the other in which his mother, plaintiff Adele Kurzius, resides (110-111).

The plaintiffs challenge the rezoning from two acres to five acres on

the grounds, among others, that, as applied to their property, it was not a reasonable response to any legitimate concerns of the Village, and that the five acre zoning itself was invalid (29a).

After a non-jury trial in Supreme Court, Nassau County, the Trial Court upheld the ordinance (9a) and declared that the zoning was constitutional -- that the plaintiffs had not proven that five acre zoning was unreasonable.

The Appellate Division, the intermediate New York Appellate Court, unanimously reversed. It did so by focusing on only one ground: the constitutional validity of the five-acre minimum lot zoning of the property (67 AD2d 71, 414 NYS2d 574, Appendix, p.A-11). After extensive discussion, the Appellate Division unanimously concluded:

> "The record demonstrates beyond peradventure of doubt that the leaders of the village, after consulting with some of the large landowners, decided to use their zoning power to preserve the village as a citadel of privilege. Thus their zoning power was not being used as a proper exercise of the police power to serve the general welfare but rather to stop the march of progress and to preserve special benefits for the privileged group of large landowners which consists mainly of present residents of the village." (67 AD2d at 81, Appendix, p. A-22).

The New York Court of Appeals unanimously reversed and reinstated the judgment of the Trial Court (51 NY2d 338, Appendix, p. A-1). In arriving at its conclusion reversing the Appellate Division, the Court of Appeals placed controlling reliance upon the decision of this Court in Agins v. City of Tiburon, __ U.S. __, 100 S.Ct. 2138. In this regard the Court of Appeals stated:

> "Although some courts have assertedly found multi-acre zoning

to be per se exclusionary and thus invalid (Developments in the Law - Zoning, 91 Harv. L. Rev. 1427, 1641), we do not so hold because of what we perceive to be legitimate purposes of such zoning." (See Agins v. City of Tiburon, _ U.S. __ 100 S.Ct. 2138, supra; Levitt v. Incorporated Village of Sands Point, 6 NY2d 269). In regard to a related question, the Supreme Court has noted that '[a] quiet place where yards are wide, people few, and motor vehicles restricted are legitimate guidelines in a land-use project addressed to family needs'. (Village of Belle Terre v. Boraas, 416 U.S. 1, 9). Although environmental factors may justify large lot zoning, we do not hold that this type of zoning is permissible without qualification, because minimum lot requirements may involve exclusionary practices." 51 NY2d 346, Appendix, p.A-9.

POINT I

THE APPELLATE DIVISION PROPERLY APPLIED THE TRADITIONAL SUBSTANTIVE DUE PROCESS ANALYSIS IN STRIKING DOWN THE FIVE-ACRE ZONING.

As early as 1959, the Virginia Supreme Court struck down an attempt by the County of Fairfax to channel population growth into one segment of the county by imposing a two acre minimum zone in another segment thereof. Board of Supervisors v. Carper, 200 Va. 653, 107 SE2d 390. The County had argued that the up-zoning was necessary for environmental reasons, i.e., to prevent an exhaustion of ground water supplies and depletion of other natural resources. The Virginia Supreme Court, noting that zoning ordinances to be valid must promote the public health, safety, prosperity, morals and public welfare, found the purported justifications for the upzon-

ing unwarranted and with "no relation to the health, safety, morals or general welfare of the owners of residents of the area so zoned." 107 SE2d at 397.

Six years later the Pennsylvania Supreme Court struck down a four acre minimum zone in National Land and Investment Company v. Kohn, 419 Pa. 504, 215 A2d 597. The Court applied traditional police power analysis to the Town's purported justifications for the upzoning, namely sanitation, drainage, inadequate roads with attendant difficulty of providing adequate fire protection, and preservation of the "character" of the area. The Court found the drainage justification "vague and unconvincing" and the traffic rationale "based upon possible future conditions." 215 A2d at 609, 610. As to preservation

of the "character" of the community, the Court stated:

> "If the preservation of open spaces is the township objective, there are means by which this can be accomplished which include authorization for 'cluster zoning' or condemnation of development rights with compensation paid for that which is taken. A four acre minimum acreage requirement is not a reasonable method by which the stated end can be achieved." 215 A2d at 611 (emph. suppl.)

And, later:

> "There is no doubt that many of the residents of this area are highly desirous of keeping it the way it is, preferring, quite naturally, to look out upon land in its natural state rather than on other homes. These desires, however, do not rise to the level of public welfare. This is purely a matter of private desire which zoning regulations may not be employed to effectuate." 215 A2d at 611 (emph. suppl.)

In 1967, the Maryland Court of Appeals upheld a five acre minimum lot size in County Commissioner's of Queen Anne's County v. Miles, 228 A2d 450, 246

Md. 355. In doing so, however, the court specifically distinguished both Carper, supra and Kohn, supra, in that the five acre zone before it amounted to only 6.7 percent of the county whereas in Carper 66.6 percent of the county was burdened with the minimum lot requirement and in Kohn the four acre minimum applied to 30 percent of the town. 228 A2d at 458. For comparison purposes, in the case at bar the respondent Village of Upper Brookville has placed within its five acre zone 46 percent of its total land area (Ex. I, pp. 27-28).

In 1970, the Supreme Court of Pennsylvania had occasion to reconsider its decision in National Land, supra, in Appeal of Kit-Mar Builders, Inc., 439 Pa. 466, 268 A2d 765. There, the constitutional validity of two and three acre minimum lot requirements was under

review. Concord Township's basis for this zoning was a purported concern for sewerage disposal. The Court applied National Land as follows:

> "As we pointed out in National Land, there are obvious advantages to the residents of a community in having houses built on four - or three - acre lots. However, minimum lot sizes of the magnitude required by this ordinance are a great deal larger than what should be considered as a necessary size for the building of a house, [footnote omitted] and are therefore not the proper subjects of public regulations. As a matter of fact, a house can fit quite comfortably on a one acre lot without being the least bit cramped. [footnote omitted] Absent some extraordinary justification, a zoning ordinance with minimum lot sizes such as those in this case is completely unreasonable." 268 A2d at 767 (Emph. suppl.).

Turning to that purported justification, the Court branded the Township's alleged concern with adequate sewerage as "patently ridiculous," 268 A2d at 769, and

invalidated both the two and three acre minima.

In 1972, the United States Court of Appeals for the First Circuit decided Steel Hill Development, Inc. v. Town of Sanbornton, 469 F.2d 956 (1st Cir. 1972). There, the issue was the propriety of a six acre minimum lot requirement. The federal court upheld the zoning but on a very limited basis. The area in question was a major recreational and resort area in New Hampshire with convenient access to most New Hampshire ski areas. The rationale for the large lot zoning by the town was that the plaintiffs' proposed cluster development would cause severe problems of pollution, sewage disposal, drainage and erosion. The court carefully read the conflicting trial testimony of the various experts and concluded that the finding of the

District Court was not clearly erroneous. Nevertheless, the court reached this conclusion most reluctantly and warned as follows:

> "Yet, though it may be proper for Sanbornton to consider the foregoing factors, we think the town has done so in a most crude manner. We are disturbed by the admission here that there was never any professional or scientific study made as to why six, rather than four or eight, acres was reasonable to protect the values cherished by the people of Sanbornton. On reviewing the record, we have serious worries whether the basic motivation of the town meeting was not simply to keep outsiders, provided they wished to come in quantity, out of the town. We cannot think that expansion of population, even a very substantial one, seasonal or permanent, is by itself a legitimate basis for permissible objection. Were we to adjudicate this as a restriction for all time, and were the evidence of pressure from land-deprived and land-seeking outsiders more real, we might well come to a different conclusion. Where there is natural population growth it has to go somewhere, unwelcome as it may be, and in that case we do

> not think it should be channeled by the happenstance of what town gets its veto in first. But, at this time of uncertainty as to the right balance between ecological and population pressures, we cannot help but feel that the town's ordinance, which severly restricts development, may properly stand for the present as a legitimate stop-gap measure." 469 F. 2d at 962. (Emph. suppl.).

The court concluded by stating:

> "Thus, while we affirm the District Court's determination at the present time, we recognize that this is a very special case which cannot be read as evidencing a general approval of 6-acre zoning and that this requirement may well not indefinitely stand without more homework by the concerned parties." 469 F. 2d at 962 (emph. suppl.)

Regardless of whether the minimum lot areas in each of the above cases were invalidated or seriously questioned, the courts took similar approaches. They compared the purported justifications for the zoning advanced by the municipalities

to the purposes for which the local enabling statute permitted land use restrictions to be imposed. They then determined whether the restrictions imposed were a reasonable response to those purported concerns. In all of the cases, the municipality had put forth concerns as to sewerage disposal, adequacy of roads, fire protection, and the like.

In the case at bar, what concerns has the Village of Upper Brookville expressed? Not one single objective other than a desire to keep the Village rural and "exactly the way it is." [Ex. 32, p. 4] Nor could it advance anything more significant than that because, based on the trial record, the Village simply did not have any justifiable concern upon which to predicate its five acre minimum zoning requirement.

Based on the trial record, the Appellate Division was correct in concluding that the Village "zoning power was not being used as a proper exercise of the police power to serve the general welfare but rather to stop the march of progress and to preserve special benefits for the privileged group of large landowners which consists mainly of present residents of the village." (67 AD2d at p. 81, Appendix, p. A-22). Far from acting as a "super legislature", the Appellate Division found that there existed here no legal nexus between any legitimate Village concern and the imposition of the five-acre zoning requirement. Thus, that Court did not substitute its judgment for that of the Board of Trustees of the Village of Upper Brookville. Rather, it applied to the zoning under review the substantive due process analysis mandated by this Court.

Accordingly, the Appellate Division correctly found that zoning invalid.

The Court of Appeals, however, specifically rejected the non-New York decisions invalidating large lot zoning, discussed above,

> "because of what we perceive to be the legitimate purpose of such zoning" (see, Agins v. City of Tiburon, __US __ , 100 S.Ct. 2138, supra, Levitt v. Incorporated Village of Sands Point, 6 NY2d 269) 51 NY2d at 346, Appendix, p. A-9.

Accordingly, the New York Court of Appeals has relied upon this Court's decision in Agins to uphold large lot zoning which has been invalidated by the highest Courts of sister states and seriously questioned by the First Circuit Court of Appeals and the Maryland Court of Appeals. In Agins this Court was concerned with a single five acre parcel on which appellant therein potentially could have build five homes, i.e., one

acre zoning. It is submitted that the Court of Appeals misread this Court's decision in Agins when it was employed to justify five acre minimum zoning of 46 percent of a municipality on the North Shore of Long Island.

Therefore, certiorari should be granted in order to determine whether the five acre minimum lot zoning of the subject property is unconstitutional as an unreasonable use of the police power, and whether this Court's decision in Agins insulates large lot zoning from constitutional scrutiny, irrespective of area, provided the alleged purpose is the preservation of open space.

POINT II

THE FIVE ACRE MINIMUM AREA REQUIREMENT IS UNCONSTITUTIONAL BECAUSE IT IS, IN PURPOSE AND EFFECT, A COMMUNITY ATTEMPT AT IMMUNIZATION AND EXCLUSION

The evidence demonstrates not only an abuse of the police power, but also an attempt by the Village to impose the minimum lot size so as to keep the Village "the way it is", a euphemism for excluding any meaningful population influx.

The relationship of minimum lot area requirements to population growth was well known to the Village at the time the ordinance revisions were being discussed in 1960. The Village Planner, Mr. McHugh, testified that, were the entire Village to remain at the pre-1960 two acre zoning classification, the

saturation population would be 3,500. (1199) Yet, in an undated letter to the Village residents entitled "Area Development Plan", it was disclosed that merely by establishing an additional five acre zone, the anticipated ultimate population would be reduced to approximately 1,850 persons. (Ex. 6) Thus, even under the two acre/five acre zoning scheme, (the least drastic of the up-zoning proposals), the Village had achieved a 48% decrease in anticipated maximum population. The record makes clear, then, the purpose of the five acre restriction: population exclusion.

That the Village achieved this goal in practice is borne out by the 1970 census data introduced by the plaintiffs at trial (Ex. 34). The following table depicts that data in conjunction with the

zoning classifications of the nearby villages, of which classifications the Trial Court below took judicial notice. (832)

Village	Percentage of Growth Since 1960	Residential Zoning
Mill Neck	40.1	5 acre, 3 acre, 8,000 sq. ft.
Matinecock	2.1	5 acre, 2 acre, 15,000 sq. ft., 10,000 sq. ft.
Upper Brookville	13.1	5 acre, 2 acre
Old Brookville	58.5	2 acre, 1 acre
Brookville	118.8	2 acre
Muttontown	64.5	2 acre, 1 acre, 1/2 acre
Old Westbury	56.2	2 acre, 1 acre, 8,000 sq. ft.

It is expecially interesting to note that

the smallest percentage growths occurred in Matinecock, Upper Brookville, and Mill Neck, in that order, the only 5 acre zoned villages in Nassau County (832). Needless to say, the vast bulk of the land in these Villages is zoned five-acre minimum.

The impact of the five-acre area requirement upon Upper Brookville housing starts was also graphically illustrated at trial: between 1961 and 1976, only seven (7) houses (including the two Kurzius homes) were built on five acre lots in the Upper Brookville five acre zone (539) and there have been no five acre subdivisions approved (other than the Kurzius') in any other Long Island village with a five acre zone. (539)

In strenuously attempting to avoid the impact of the above, the Village urges that the zoning ordinance finally adopted was hardly designed to create a

"citadel of privilege", a characterization established by the Appellate Division (67 AD2d 81, Appendix, p. A-22). Were that the true intent, the Village argued in the Court of Appeals, "the minimum lot size might have been fixed at one of the larger alternatives which were considered and rejected." (Appellants' Brief in Court of Appeals at p. 17)

Yet the record unmistakably discloses an intent by the Village fathers to mandate the largest minimum lot size possible that would withstand judicial scrutiny in order to maintain the status quo for reasons unconnected with the purposes of zoning (Village Law, §7-704). (704, 1348) Indeed, from McHugh's very first meeting with the Board of Trustees, it became clear that at least three of the trustees had misgivings as to whether a 20-acre minimum lot size could survive

a court test. (704, 705) The larger lot zoning proposals, moreover, were later labelled "too ambitious" by several of the trustees. (1348)

By June, 1960, the real purpose behind the entire up-zoning was made abundantly clear by Mr. McHugh in his report to the trustees:

> "It appears that Upper Brookville and its neighboring villages will be subject to increasing pressures for more intensive land utilization and development in the future. Inasmuch as their general character and outlook are similar, the six villages [Matinecock, Mill Neck, Old Brookville, Brookville, Muttontown and Upper Brookville] would be well advised to join forces in preparing an 'area plan' and in exercising related controls to protect themselves." (6/3/60 report, p. 4, emph. suppl.)

Despite the obvious purpose of the substantial increase in the area requirements as aforesaid, the Village made every effort to redact the June 1960

plan so as to expunge therefrom all references to this plan which have any relationship to limiting the population of the Village. In a three week period between September 13, 1960 and October 11, 1960, the Village, not its planner, took great pains to carefully eliminate all such references (1375-1388).

Several specific illustrations of these changes are as follows:

(a) On page 22 of Exhibit "5", subparagraph "c" of paragraph "B-2" was amended in the final version so as to eliminate all reference to population growth as an element of planning and to relate such growth to "general economic conditions".

(b) Again on page 22 of Exhibit "5", paragraph "C.5" was eliminated in its entirety in Exhibit "I". This sentence, while innocuous in and of

itself, assumes greater significance when read with other expressions of intent which have been previously referred to herein and those specifically deleted after careful redaction by Village officials and not the planner.

(c) On page 24 of Exhibit "5" in the opening paragraph of the section entitled "Major Land Uses", the language at the end of the second sentence "and it suggests methods of preventing undesirable forms of growth" was deleted from the final plan dated October 11, 1960 (Ex. "I").

In summary, the record reveals a village in 1960 acutely aware of the relationship between large lot zoning and population growth. It reveals a village unalterably dedicated to retaining the status quo, unconnected with any purpose of zoning (Village Law, §7-704) by

imposing the highest possible minimum area standard that would withstand judicial scrutiny. It reveals a village concocting a "Comprehensive Plan" at the behest of the major landowners, a plan amounting to no more than an apologia for the desires of those owners. It reveals a village imposing a minimum area standard for no other reason than to secure immunization from future growth pressures. It reveals a village which, in fact, has succeeded in preventing any meaningful population influx.

The Appellate Division (67 AD2d at p. 78, Appendex, p. A-19) correctly saw in these machinations a reflection of the desire of those responsible for the ordinance

> "'to be left alone by the forces of change' and thereby to exclude from a large part of the village anyone who could not afford to purchase a minimum of

five acres and build a home appropriate for such a large lot." (1443-44)

POINT III

THE FIVE ACRE MINIMUM AREA REQUIREMENT IN THE UPPER BROOKVILLE ZONING ORDINANCE IS UNCONSTITUTIONAL BECAUSE IT IS NEITHER A NECESSARY NOR REASONABLE RESPONSE TO THE PURPOSES FOR WHICH A VILLAGE MAY RESTRICT LAND USE AND IT IS NOT ENACTED FOR A VALID POLICE POWER PURPOSE.

(a) The Five Acre Standard Finds No Justification In The Village Police Powers.

Section 7-704 of the New York Village Law sets forth in detail the purposes for which a municipality may impose land use restrictions as follows:

1. lessen congestion in the streets;
2. secure safety from fire, panic, floods and other dangers;
3. promote health and general welfare;
4. provide adequate light and air;
5. prevent overcrowding of land;
6. avoid undue concentration of population;
7. facilitate adequate provision of transportation, water, sewerage,

schools, parks and other public requirements.

Section 7-704 concludes with the admonition that such zoning regulations "shall be made with reasonable consideration, among other things, as to the character of the district and its peculiar suitability for particular uses, and with a view to conserving the value of buildings and encouraging the most appropriate use of the land throughout such municipality." The record amply demonstrates that the Upper Brookville ordinance cannot find justification in any of the above seven purposes enunciated in section 7-704. To the contrary, that record portrays in sharp relief the <u>real</u> purpose behind the ordinance: to satisfy the desires of the major landowners of the Village by keeping the Village exactly the way it

has been over the years, and, as a necessary corollary, to prohibit any meaningful population influx.

The record discloses that five acre zoning was not necessary to lessen congestion in the streets of Upper Brookville. Plaintiff's expert land planner testified that even had the subject property been placed in the two acre zone, the effect on traffic would have been miniscule because a minimal number of additional vehicle trips per day would be generated and because existing county roads are capable of carrying a substantial volume of traffic through the Village (771). Thus, not only could any traffic increase easily be accommodated, but also the Village road maintenance budget would be unaffected as the bulk of that newly generated traffic would traverse county roads. (590, 771)

The record discloses that imposition of a five acre zone was not necessary to secure safety from fire, panic, flooding and other dangers. (820) Indeed, fire considerations would be totally inappropriate because the Village does not even have its own fire department, but rather contracts with the fire department of a neighboring community for fire protection (822). In any event, the defendant presented no evidence on this issue.

Concerning police protection, the uncontradicted expert testimony of plaintiff's land planner was that the construction of new homes on the subject property, if zoned for two-acre development, could conceivably result in an increased number of police calls, but this consideration was not significant

enough to warrant placing the property in the five acre zone. (822)

The uncontradicted evidence revealed that Upper Brookville itself furnishes no services to its residents. It contracts with outside agencies for police services, street lighting, water and fire protection, street maintenance, and solid waste collection. (828, 830)

Five acre zoning was not required for provision of adequate sewerage disposal due to the fact that each new unit constructed would be required to have a septic tank or cesspool sufficient to meet anticipated needs. (591-595, 826)

Moreover, uncontradicted evidence indicated that the soils on the subject property possess excellent leeching capability and that existing water supply services were more than adequate to accommodate the estimated population

increase attendant to two acre development of the subject 50 acre property. (826)

The uncontradicted evidence established that placement of the subject property in the five acre zone was not necessary to prevent overcrowding, traffic congestion, reduction of light and air, or danger from panic. (591) In this regard, plaintiffs presented uncontradicted testimony indicating that the school age population in the district serving the subject property was declining. (787)

(b) The Five Acre Requirement Was Enacted At The Behest Of The Major Landowners For Reasons Having Nothing To Do With Proper Municipal Concerns.

Thus, the five acre requirement finds absolutely no justification in the

Village police powers. On the contrary, the record makes it clear that the Upper Brookville Zoning Ordinance was developed to preserve the interests of the then existing large landowners in the Village without regard to the permissable objective of zoning. In the words of the Village itself in a newsletter to residents, the new zoning was designed to keep the Village "exactly the way it is." (Ex. 32, p. 4)

The chronology leading to the passage of the ordinance now under review provides ample testimony to that objective and supports the decision of the Apellate Division in this regard. It is undisputed that, after his retention in 1959, the first thing which Francis Dodd McHugh, the author of the Plan, did was to check with the Village rules to determine what they sought to accomplish

in its Comprehensive Plan. (Ex. 38, p. 4).

Mr. McHugh's initial recommendation was to change the two acre zoning which had existed since the creation of the Village 28 years earlier, to four districts consisting of 20 acres, ten acres, five acres and two acres (1341). By the November 30, 1959 meeting of the Planning Board,* however, the Village had grown fearful of such large lot zoning because of its susceptibility to legal challenge (706). In addition the Trustees** felt the need for more

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* The Village Planning Board, in New York, functions in an advisory capacity in connection with rezonings. (Village Law, Sec. 7-726 et seq.

** The Village Board of Trustees, in New York, functions in a legislative capacity in rezonings when it actually passes a local law or ordinance rezoning the property. (Village Law, Sec. 7-700 et seq.)

guidance from the large landowners in the Village (706). The official minutes of that meeting of the Board of Trustees, held in the Mayor's home, reflect these concerns as follows:

(1) Mr. McHugh stated that he would be glad to answer any questions pertaining to the progress made to date and to think of the studies and map material and memoranda which has been submitted to the Village authorities to date [sic]. (704)

Trustee Seaman expressed some misgivings as to a 20-acre minimum residential unit surviving a court test. Mr. Miller and Mr. Wickham shared this doubt but expressed themselves as being open-minded and in need of further argument before reaching final conclusions." (704) (emph. suppl)

(2) Mr. Ault (the then chairman of the Planning Board) and Mayor Edey "stressed the importance of consulting the large landowners to give them opportunity to express their views and position on

any such proposals." (705) emph. suppl.)

The minutes of that November 30, 1959 meeting further state:

"Mr. Miller and the Village Attorney pointed out that the same objectives of five, ten or twenty-acre residential unit minimums could be achieved by the larger landowners entering into a declaration of restrictions recordable in the office of the Clerk of Nassau County and binding upon the land and all future owners thereof for a term of years. It was pointed out that there were essentially nine landowners in the larger estate category of which five were completely of this character and four partly of this character. There was general discussion regarding the relative advantages of five, ten, and twenty-acre minimums, and the practical and legal effect of each and the possibility of their surviving a court test." (705) (emph. suppl.)

Those minutes continue:

"After further general discussion it was decided that a committee of Village authorities be authorized to discuss with the larger landowners the wisdom of

a master plan and zoning which would establish larger residential units for residential use and to discuss with them the possibility of attaining these objectives by the recording of an appropriate declaration of covenants and restrictions." (706) (emph. suppl.).

Thus, it is demonstrated by means of official Village records that Francis Dodd McHugh was not retained by the Village for the purpose of making use of his expertise as a planner to develop an objective Comprehensive Plan. Mr. McHugh was, in fact, retained as a mere scrivener to record the desires of the major landowners in a document to be entitled "Comprehensive Plan".

Indeed, the very procedure adopted by Mr. McHugh stands in stark contrast to the procedure described by Harold J. Letson, a highly qualified professional planner (716) who testified as to his role in the preparation of a

comprehensive master plan for the entire Town of Huntington, Long Island. In describing his approach to this task, Letson stated:

> "Well, in my own case, and that is to say in the case of Huntington, the consultant was told to prepare the analyses and the recommendation totally independently. We did that and we prepared our findings for the township in a series of preliminary reports which were in good form and bound, finished documents to all intents and purposes, and that series of reports contained the independent recommendations and analyses of the consultant. They were submitted to a citizen's advisory committee which then did its own independent analysis, the two efforts resulting in a final plan which was ultimately adopted by the Town of Huntington Planning Board." (718, emph. suppl)

Thus, Letson was told to utilize his independent professional expertise to develop a land use plan for the Town of Huntington. His independent findings and recommendations were then made the focus of further inquiry and discussion.

In contrast, Mr. McHugh had a totally different function: to find out how the large landowners wanted the Village to develop (or not develop) and implement that objective in a "master plan". Thus, McHugh's effort was doomed from the beginning to be nothing more than an apologia for existing patterns of development.

The extent of McHugh's consultations with large landowners was detailed by him on cross-examination:

> "Q. Did you ever discuss your proposals with large land owners?
>
> A. I went. The answer is yes.
> Q. How many large land owners did you talk to?
>
> A. Just a minute, please. My recollection is that these were very informal meetings with the people at their homes and I went with the mayor and usually Mr. Ault to describe the technical aspects of the things we were studying, and one of those people was Mr. Arthur

Dean who owns considerable acreage up there adjacent to the Coe estate, the Davidsons who own the property that is now the Miller Club, Mr. Sam Mitchel who owned considerable acreage most of which he has now given to the Nature Conservancy, and that is as far as I can remember.

Q. Did you have more than one meeting with these people?

A. Each of the gentlemen was separately met at his own house which was arranged by the mayor or the chairman of the Planning Board. These were not anything more than informal presentations of ideas and the exchange of information.

Q. How many of such meetings did you have with each of these gentlemen?

A. One." (1342-3, emph. suppl.)

After the aforesaid individual meetings with the large landowners, Mr. McHugh presented a new proposal to the Village on March 13, 1960, in which the Village was divided into two, five and eight acre minima, rather than the two,

five and twenty, or two, five and ten acre zones that had originally been proposed (707).

In May, 1960, the Village dispatched a letter to all residents notifying them of the latest proposal for the three zoning classifications (Ex. 38). By June 3, 1960, Mr. McHugh's efforts had been compiled into a proposed Comprehensive Plan, essentially reflecting the terms of the May, 1960 letter to residents and providing for three zones of two acres, five acres and eight acres. (Ex. 6)

At the July 13, 1960 Planning Board meeting, however, it became apparent that certain influential landowners were not satisfied with this plan (1226). At that meeting, representatives of Messrs. Grace and Torr, large landowners in the Village, objected to the inclusion of their properties within the proposed

five-acre zone on the grounds that their properties were surrounded on both sides by property to be placed in the proposed two-acre zone (1226-1227). They, too, felt their lands should be placed in the two-acre zone (1226-1227). Accordingly, succumbing to their wishes, the Planning Board agreed to recommend to the Board of Trustees that their two properties be reclassified in the two-acre zone (810). The Trustees dutifully complied with the wishes of Messrs. Torr and Grace and their properties were removed from the proposed five-acre designation and placed into the two-acre zone (Ex. 7).

By October, 1960, the Village had again changed its mind concerning the proposed Comprehensive Plan. In an October 10, 1960 letter to Village residents, Mayor Edey detailed the reasons for the Board's decision to

eliminate the proposed eight-acre zone and to have only a five-acre zone and a two-acre zone in the Village, with the Grace and Torr properties included in the two-acre zone but the subject property in the five-acre zone. (Ex.41)

The elimination of the eight-acre zone had been accomplished rapidly indeed. Mr. McHugh testified that his proposed Master Plan dated June 4, 1960 (containing the proposed eight-acre, five-acre and two-acre zones) remained unrevised after public hearings held on August 2, 1960, August 9, 1960 and September 13, 1960 (1374). However, by the Planning Board meeting of October 11, 1960, an entirely new Comprehensive Plan had been negotiated, agreed upon and published (1375), containing only a five-acre and a two-acre zone, with a change in the zone of the two specific

properties -- Grace and Torr above described (1376).

Thus, a Comprehensive Plan which had been under active consideration by the Board of Trustees since at least May, 1959 was, sometime during the 28-day period between September 13 and October 11, 1960, changed to accommodate the desires of Messrs. Grace and Torr and of other large landowners (1376). Indeed, the influence of these landowners was so pervasive that McHugh, by his own admission, did not even participate in the final discussions which resulted in the shifting of the Grace and Torr properties from the five-acre to the two-acre zone (1226). The negotiated division of the Village was complete. The large landowners were satisfied. Mr. McHugh formally put forth "his" Master Plan. The Village Board implemented it

by enacting an appropriate zoning ordinance.

In summary, clearly the five-acre zone enacted by the Village in 1960 was neither a reasonable nor necessary response to any concern pursuant to which a municipality may legally impose land use restrictions. Thus, that zoning is unconstitutional, for it is "clearly artibrary and unreasonable, having no substantial relation to the public health, safety, morals, or general welfare." Euclid v. Ambler, 272 US 365; see also, Golden v. Planning Board of Town of Ramapo, 30 NY2d 359, 334 NYS2d 138.

Moreover, the blatently improper method by which the comprehensive plan and zoning were arrived at shows that that plan and zoning were hardly a response to any legitimate municipal concerns, but were, in reality, nothing

more than the effectuation of the desires of the major landowners to maintain and insure the status quo by means of large lot area restrictions.

CONCLUSION

Certiorari should be granted in order to settle the conflict between the New York Court of Appeals and the Supreme Courts of Pennsylvania and Virginia. Further on a *dictum* level, the New York Court of Appeals is in conflict with the Maryland Court of Appeals and the First Circuit Court of Appeals.

Respectfully submitted,

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APPENDIX

ROBERT E. KURZIUS, INC., et al., Respondents, v INCORPORATED VILLAGE OF UPPER BROOKVILLE, Appellant.

Argued October 6, 1980; decided November 20, 1980

SUMMARY

APPEAL from an order of the Appellate Division of the Supreme Court in the Second Judicial Department, entered March 26, 1979, which (1) reversed, on the law and the facts, a judgment of the Supreme Court at Special Term (DOUGLAS F. YOUNG, J.), entered in Nassau County after a nonjury trial, declaring valid and constitutional that part of a zoning ordinance which created a five-acre minimum lot requirement in certain areas of the Incorporated Village of Upper Brookville which are zoned for residential use, and (2) declared that portion of the zoning ordinance unconstitutional as an unreasonable and improper exercise of the police power.

In an action for a declaratory judgment, plaintiffs attacked a zoning ordinance of the Village of Upper Brookville which created, in certain areas of the village, minimum lot requirements of five acres. The issue on appeal was whether the ordinance was constitutionally void and also invalid because not enacted in compliance with section 7-704 of the Village Law.

The Court of Appeals reversed the order of the Appellate Division and reinstated the judgment of the Supreme Court, holding, in an opinion by Judge GABRIELLI, that the ordinance was constitutionally and statutorily valid, since there was no proof that regional needs were ignored in formulating the ordinance or of a discriminatory purpose, and no proof that the ordinance has excluded or will exclude persons having a need for housing within the municipality or within the region.

Robert E. Kurzius, Inc. v Incorporated Vil. of Upper Brookville, 67 AD2d 70, reversed.

HEADNOTES

Municipal Corporations — Zoning — Large-Lot Zoning

1. A zoning ordinance of the defendant village which creates, in certain areas of the village, minimum lot requirements of five acres, is constitutionally and statutorily valid, where there was no proof of regional needs or discriminatory purpose and no proof that the ordinance has excluded or will exclude persons having a need for housing within the municipality or within the region; the purpose of the ordinance was to preserve the open-space areas of the village, which may be a legitimate goal of multiacre

zoning, and plaintiffs have not demonstrated that the ordinance was not enacted in accordance with a comprehensive master plan or that pressing regional needs were ignored in formulating the ordinance. The ordinance was not an unreasonable and improper exercise of the police power, or beyond the power delegated by section 7-704 of the Village Law.

Municipal Corporations — Zoning

2. In general, the enactment of a zoning ordinance is a valid exercise of the police power if its restrictions are not arbitrary and they bear a substantial relation to the health, welfare and safety of the community, and section 7-704 of the Village Law provides that zoning regulations must be made in accordance with a comprehensive plan, and may be made only for certain enumerated purposes, including the promotion of health and the general welfare of the village; thus, both the constitutional and statutory validity of a zoning ordinance depend on the facts of the particular case and whether it is really designed to accomplish a legitimate public purpose, and a zoning ordinance will be invalidated on both constitutional and State statutory grounds if it was enacted with an exclusionary purpose, or it ignores regional needs and has an unjustifiably exclusionary effect.

Municipal Corporations — Zoning — Constitutionality

3. As legislative acts, zoning ordinances carry a presumption of constitutionality, which presumption is rebuttable, but unconstitutionality must be demonstrated beyond a reasonable doubt; if the validity of the legislative classification for zoning purposes is fairly debatable, the legislative judgment must be allowed to control.

Municipal Corporations — Zoning — Large-Lot Zoning

4. There is a two-part test for determining when large-lot zoning has been used in an impermissible manner: first, the local board is required to provide a properly balanced and well-ordered plan for the community; and secondly, in enacting the zoning ordinance, consideration must be given to regional needs and requirements. Generally, a zoning ordinance enacted for a statutorily permitted purpose will be invalidated only if it is demonstrated that it was enacted for an improper purpose or if it was enacted without giving proper regard to local and regional housing needs and has an exclusionary effect, and once an exclusionary effect coupled with a failure to balance the local desires with housing needs has been proved, then the burden of otherwise justifying the ordinance shifts to the defendant.

TOTAL CLIENT-SERVICE LIBRARY® REFERENCES*

67 NY Jur, Zoning and Planning Laws §§ 21, 118, 163
CLS, Village Law § 7-704
82 Am Jur 2d, Zoning and Planning §§ 25, 96, 103
16 Am Jur Trials 99, Relief From Zoning Oordinance

ANNOTATION REFERENCES

Validity of zoning regulations precribing minimum area for house lots or requiring an area proportionate to numbe of families to be housed. 95 ALR2d 716.

Comment Note.—Exclusionary zoning. 48 ALR3d 1210 (as to minimum lot-area requirements, see § 5).

* By the Publisher's Editorial Staff.

POINTS OF COUNSEL

Joseph L. Tobin, Jr., for appellant. I. The holding of the court below that defendant's five-acre zoning is "exclusionary" is neither supported by proof in the record nor by the decisions of this court. *(Matter of Golden v Planning Bd. of Town of Ramapo,* 30 NY2d 359; *Berenson v Town of New Castle,* 38 NY2d 102.) II. The zoning ordinance is not discriminatory as applied to plaintiffs' property. *(Matter of Grimpel Assoc. v Cohalan,* 41 NY2d 431.) III. The zoning ordinance, as applied to the subject property, is consonant with the comprehensive plan. *(Albright v Town of Manlius,* 28 NY2d 108; *Rogers v North Amer. Philips Co.,* 37 Misc 2d 923, 19 AD2d 838; *Twenty-one White Plains Corp. v Village of Hastings-on-Hudson,* 14 Misc 2d 800, 9 AD2d 934; *Matter of Town of Bedford v Village of Mount Kisco,* 33 NY2d 178.) IV. The zoning ordinance is not confiscatory as applied to plaintiffs' property. *(Gates of Woodbury Co. v Town of Oyster Bay,* 29 AD2d 943; *Koff v Incorporated Vil. of Flower Hill,* 29 AD2d 655, affd *sub nom. Chase Manhattan Bank v Incorporated Vil. of Flower Hill,* 28 NY2d 694.)

John M. Armentano, George J. Farrell, Jr., and *Robert V. Guido* for respondents. I. The five-acre minimum area requirement in the Upper Brookville zoning ordinance is illegal because it is neither a necessary nor reasonable response to the purposes for which a village may impose land use restrictions under the village law. II. The five-acre minimum area requirement is unconstitutional because it is, in purpose and effect, a community attempt at immunization and exclusion. III. The court below properly applied the traditional substantive due process analysis in striking down the five-acre zoning. *(Levitt v Incorporated Vil. of Sands Point,* 6 NY2d 269; *Westwood Forest Estates v Village of South Nyack,* 23 NY2d 424; *French Investing Co. v City of New York,* 39 NY2d 587; *Steel Hill Dev. v Town of Sanbornton,* 469 F2d 956.) IV. The Upper Brookville ordinance is unconstitutional because it was not enacted pursuant to a comprehensive plan as required by section 7-704 of the Village Law. *(Udell v Haas,* 21 NY2d 463; *Rogers v North Amer. Philips Co.,* 37 Misc 2d 923, 19 AD2d

838; *Twenty-one White Plains Corp. v Village of Hastings-on-Hudson,* 14 Misc 2d 800, 9 AD2d 934; *Town of North Hempstead v Village of North Hills,* 38 NY2d 334; *Matter of Town of Bedford v Village of Mount Kisco,* 33 NY2d 178.) V. The Upper Brookville zoning ordinance as applied to the Kurzius property is discriminatory and therefore void. VI. The rezoning of plaintiffs' property is confiscatory in that it has rendered it unmarketable. *(McGowan v Cohalan,* 41 NY2d 434; *French Investing Co. v City of New York,* 39 NY2d 587; *Williams v Town of Oyster Bay,* 32 NY2d 78.) VII. As to the contention of the *amici curiae,* neither the "regional development plan" and the "north shore area plan" nor the Adirondack Park Agency Act and the cases cited by *amici curiae* furnish a justification for the zoning under review. *(Wambat Realty Corp. v State of New York,* 41 NY2d 490; *Levitt v Incorporated Vil. of Sands Point,* 6 NY2d 269.)

Gus Bauman for National Association of Home Builders and others, *amici curiae.* Large-lot zoning (here, five acres) has the demonstrable effect, if not also the purpose of so increasing housing costs as to be exclusionary, thereby unconstitutionally violating the police power standard of protecting the public health, safety or general welfare. *(Berenson v Town of New Castle,* 38 NY2d 102; *Matter of Golden v Planning Bd. of Town of Ramapo,* 30 NY2d 359, 409 US 1003.)

William H. Mathers for Village of Cove Neck, *amicus curiae.* I. The North Shore Area Plan (NSAP) which calls for low density zoning is compatible with and supported by other regional plans. II. The concept of exclusionary zoning must only be examined within the framework of regional needs and practical considerations. *(Euclid v Ambler Co.,* 272 US 365; *Matter of Diocese of Rochester v Planning Bd. of Town of Brighton,* 1 NY2d 508; *Matter of Wulfsohn v Burden,* 241 NY 288; *Berenson v Town of New Castle,* 38 NY2d 102.) III. Five-acre zoning does not stop growth if it is compatible with regional plans which direct where proper growth should take place. *(Village of Belle Terre v Boraas,* 416 US 1.)

Edward N. Costikyan and *Steven S. Honigman* for North Shore Area Mayors Joint Municipal Survey Committee, *amicus curiae.* I. The ordinance accomplishes a legitimate public purpose by preserving open space. *(Levitt v Incorporated Vil. of Sands Point,* 6 NY2d 269; *Matter of Golden v Planning Bd. of Town of Ramapo,* 30 NY2d 359; *Village of Belle Terre v*

Boraas, 416 US 1.) II. The ordinance is not exclusionary. (*Matter of Fulling v Palumbo,* 21 NY2d 30; *Salamar Bldrs. Corp. v Tuttle,* 29 NY2d 221; *Connolly v Incorporated Vil. of East Hills,* 26 NY2d 801; *Gardner v Le Boeuf,* 24 Misc 2d 511, 15 AD2d 815.)

OPINION OF THE COURT

GABRIELLI, J.

[1] Plaintiffs, in this action for a declaratory judgment, attack a zoning ordinance of the defendant Village of Upper Brookville which creates, in certain areas of the village, minimum lot requirements of five acres. The ordinance in question was adopted some 20 years ago and, while plaintiffs originally attacked the ordinance on various grounds, the Appellate Division by its holding and the plaintiffs, in this court by their briefs and argument, have narrowed the law issues to the sole contentions that the ordinance is constitutionally void and also invalid because not enacted in compliance with section 7-704 of the Village Law. The Appellate Division sustained plaintiffs' claim of constitutional invalidity and struck down the ordinance. We reverse and sustain the ordinance.

The Village of Upper Brookville, located on the north shore of Long Island, enacted a zoning ordinance in 1960 which required a minimum lot size of at least two acres in some portions of the village, and at least five acres in other portions. At that time the village contained a number of relatively peaceful and rural areas. The ordinance was enacted by the village some two months after its approval and adoption of a comprehensive master plan involving the entire 2,737 acre area of the village. This plan was the culmination of an 18-month study conducted under the direction of Francis Dodd McHugh, an architect and professional planner engaged by the village. The master plan as finally adopted was the product of intensive studies made by both the village planning board and the board of trustees, and was subjected to and widely discussed at several announced public hearings.

In 1968, the corporate plaintiff purchased a 60-acre tract of land within the village. Pursuant to the provisions of the ordinance adopted some eight years prior to plaintiffs' purchase of his acreage, 10 acres of this land were zoned for 2-acre lot development, and the remaining land was in a zone

requiring a minimum lot size of 5 acres. A short time later, the corporate plaintiff received subdivision approval for five 2-acre lots to be placed on the 10-acre parcel, and subsequently erected and sold five houses on these lots. Plaintiffs later commenced an action attacking the 5-acre minimum lot requirement on their remaining 50 acres alleging, among other things, that the ordinance was unconstitutional as an unreasonable and improper exercise of the police power. It remains undisputed that the subject property lies within a coherent area characterized by estate-type development and is generally bounded by properties developed on a large lot basis.

[2] In general, the enactment of a zoning ordinance is a valid exercise of the police power if its restrictions are not arbitrary and they bear a substantial relation to the health, welfare and safety of the community *(Euclid v Ambler Co.,* 272 US 365, 395). In New York, the Legislature has delegated zoning power to village boards pursuant to section 7-700 of the Village Law. Such delegation is not, of course, "coterminous with stated police power objectives and has been considered less inclusive traditionally" *(Matter of Golden v Planning Bd. of Town of Ramapo,* 30 NY2d 359, 370, app dsmd 409 US 1003). Section 7-704 of the Village Law provides that these zoning regulations must be made in accordance with a comprehensive plan, and may be made only for certain enumerated purposes, including the promotion of health and the general welfare of the village. Thus, both the constitutional and statutory validity of a zoning ordinance depend "on the facts of the particular case and whether it is 'really designed to accomplish a legitimate public purpose' " *(Berenson v Town of New Castle,* 38 NY2d 102, 107, quoting *Matter of Wulfsohn v Burden,* 241 NY 288, 299).

[1, 2] A zoning ordinance will be invalidated on both constitutional and State statutory grounds if it was enacted with an exclusionary purpose, or it ignores regional needs and has an unjustifiably exclusionary effect *(Matter of Golden v Planning Bd. of Town of Ramapo, supra; Berenson v Town of New Castle, supra).* However, in this case, because there was insufficient and, indeed, a complete absence of proof of regional needs or a discriminatory purpose and no proof that the zoning ordinance in question has excluded or will exclude persons having a need for housing within the municipality or within the region, the issues are narrowed to the questions of whether five-acre zoning is exclusionary per se and an imper-

missible exercise of the police power, and whether the village acted within the ambit of section 7-704 of the Village Law.

[1, 3] As legislative acts, zoning ordinances carry a presumption of constitutionality *(Town of Huntington v Park Shore Country Day Camp of Dix Hills,* 47 NY2d 61, 65; *Marcus Assoc. v Town of Huntington,* 45 NY2d 501, 505). We have stated on several occasions that this presumption is rebuttable, but that unconstitutionality must be demonstrated beyond a reasonable doubt (e.g., *Marcus Assoc. v Town of Huntington, supra).* This burden has not here been met. As Judge FULD stated in *Rodgers v Village of Tarrytown* (302 NY 115, 121): "[T]he power of a village to amend its basic zoning ordinance in such a way as reasonably to promote the general welfare cannot be questioned. Just as clearly, decision as to how a community shall be zoned or rezoned, as to how various properties shall be classified or reclassified, rests with the local legislative body; its judgment and determination will be conclusive, beyond interference from the courts, unless shown to be arbitrary, and the burden of establishing such arbitrariness is imposed upon him who asserts it. In that connection, we recently said *(Shepard v. Village of Skaneateles,* 300 N. Y. 115, 118): 'Upon parties who attack an ordinance * * * rests the burden of showing that the regulation assailed is not justified under the police power of the state by any reasonable interpretation of the facts. "If the validity of the legislative classification for zoning purposes be fairly debatable, the legislative judgment must be allowed to control." *(Village of Euclid v. Ambler Realty Co.,* 272 U. S. 365, 388; see, also, *Town of Islip v. Summers Coal & Lbr. Co.,* 257 N. Y. 167, 169, 170; *Matter of Wulfsohn v. Burden,* 241 N. Y. 288, 296-297.)' "

[2, 4] The zoning power, when properly used, is an effective means to promote the public welfare. Large-lot zoning has also been used to achieve this end, and minimum acre lot restrictions have been upheld on several occasions for varying reasons (see 1 Anderson, New York Zoning Law and Practice [2d ed], § 7.11) including, most recently, the preservation of open-space land and the protection of a municipality's residents from the ill-effects of urbanization *(Agins v City of Tiburon,* — US —, —, 100 S Ct 2138, 2141-2142). We realize, of course, that large-lot zoning may also be used as a means to exclude persons of low or moderate income; and as we have stated before, we will not countenance community efforts at exclusion under any guise *(Matter of Golden v Planning Bd. of*

Town of Ramapo, 30 NY2d 359, 378, app dsmd 409 US 1003, *supra).*

[4] The tests for determining when large-lot zoning has been used in an impermissible manner are suggested by our decision in *Berenson v Town of New Castle* (38 NY2d 102, *supra).* In that case we dealt with the validity of an ordinance excluding multifamily housing as a permitted use. There we expressed our concern for balanced and integrated communities, as well as our concern that regional needs be met. These concerns gave rise to a two-part test. First, the local board is required to provide a properly balanced and well-ordered plan for the community. Secondly, in enacting the zoning ordinance, consideration must be given to regional needs and requirements. This portion of the test was fashioned to meet the demands of both the Constitution and New York's statutory scheme, because under either basis the regulation must promote the regional welfare (see Developments in the Law—Zoning, 91 Harv L Rev 1427, 1638). It requires a "balancing of the local desire to maintain the *status quo* within the community and the greater public interest that regional needs be met" *(Berenson v Town of New Castle, supra,* p 110). In this regard we there noted that "[s]o long as the regional and local needs for such housing were supplied by either the local community or by other accessible areas in the community at large, it cannot be said, as a matter of law, that such an ordinance had no substantial relation to the public health, safety, morals or general welfare" *(supra,* p 111).

Generally then, a zoning ordinance enacted for a statutorily permitted purpose will be invalidated only if it is demonstrated that it actually was enacted for an improper purpose or if it was enacted without giving proper regard to local and regional housing needs and has an exclusionary effect. Once an exclusionary effect coupled with a failure to balance the local desires with housing needs has been proved, then the burden of otherwise justifying the ordinance shifts to the defendant (see Developments in the Law—Zoning, 91 Harv L Rev 1427, 1641). Such is not, however, the case before us.

[1] In the instant case, plaintiffs attempted to show that the enactment of the village ordinance was motivated by an improper purpose by pointing to a portion of the testimony of the architect retained by the village board. In his testimony he stated that he had consulted with people within the village including, of course, large landowners. This testimony does

not and cannot sustain the plaintiffs' burden of proving an exclusionary purpose, nor does it demonstrate any such purpose, particularly when coupled with the other evidence presented in this case. The record shows clearly that the purpose of the ordinance was to preserve the open-space areas of the village, which may be a legitimate goal of multiacre zoning (see *Agins v City of Tiburon*, — US —, 100 S Ct 2138, *supra*). Additionally, plaintiffs have not demonstrated that the ordinance in question was not enacted in accordance with a comprehensive master plan, or that pressing regional needs were ignored in formulating the ordinance.* There was no proof that persons of low or moderate incomes were foreclosed from housing in the general region because of an unavailability of properly zoned land. In fact, there was no showing of need in the village for lots of less than five acres. Thus, plaintiffs failed to prove that the two-pronged *Berenson* test had not been met. Absent a showing by plaintiff of an exclusionary purpose behind a zoning ordinance, or that the zoning authority had failed to meet the criteria set forth in *Berenson*, the presumption of constitutionality which accompanies the legislative act must prevail unless the ordinance is without a doubt facially invalid. Based upon the record before us, we cannot say that the ordinance in question was an unreasonable and improper exercise of the police power, or beyond the power delegated by section 7-704 of the Village Law.

Although some courts have assertedly found multiacre zoning to be per se exclusionary and thus invalid (Developments in the Law—Zoning, 91 Harv L Rev 1427, 1641), we do not so hold because of what we perceive to be legitimate purposes of such zoning (see *Agins v City of Tiburon*, — US —, 100 S Ct 2138, *supra*; *Levitt v Incorporated Vil. of Sands Point*, 6 NY2d 269). In regard to a related question, the Supreme Court has noted that "[a] quiet place where yards are wide, people few, and motor vehicles restricted are legitimate guidelines in a land-use project addressed to family needs" (*Village of Belle Terre v Boraas*, 416 US 1, 9). Although environmental factors may justify large-lot zoning, we do not hold that this type of zoning is permissible without qualification, because minimum lot requirements may involve exclusionary practices.

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*Although regional needs may presently be met, this does not foreclose a zoning ordinance from all future inquiry. As population patterns shift and the demand for housing in a given region necessarily increases, a re-examination of an existing zoning scheme may be warranted (see *County Comrs. of Queen Anne's County v Miles*, 246 Md 355; see, also, *Steel Hill Dev. v Town of Sanbornton*, 469 F2d 956).

We recognize that area zoning of this nature might in some circumstances not here present tend to prevent some individuals from making use of zoned land, just as any zoning ordinance tends to prevent certain other desired uses. Therefore, in order to withstand a claim of the potential for an exclusionary effect, these ordinances must be motivated by a proper purpose. The contrary has not here been demonstrated.

In *Berenson* we pointed our the anomaly of a court's being required to perform the tasks of a regional planner, since zoning and regional planning are essentially legislative acts *(Berenson v Town of New Castle,* 38 NY2d 102, 111, *supra).* Since that time several comprehensive plans for the region have been developed. However, because these studies were not part of the record on appeal, they could not be considered by the court (see *Matter of Levine v New York State Liq. Auth.,* 23 NY2d 863). Nonetheless, they illustrate the approach to regional zoning problems which was favored in *Berenson.*

Upon the record before us, plaintiffs have not met their burden of proving an exclusionary purpose or noncompliance with the *Berenson* criteria. They have thus failed to overcome the presumption of constitutionality which attaches to the village ordinance in question, and have failed to demonstrate that the ordinance did not meet the requirements of the Village Law. We also find the other arguments put forth by plaintiffs to be without merit.

Accordingly, the order should be reversed, with costs, and the judgment of Supreme Court, Nassau County, declaring the ordinance to be valid, reinstated.

Chief Judge COOKE and Judges JASEN, JONES, WACHTLER, FUCHSBERG and MEYER concur.

Order reversed, with costs, and the judgment of Supreme Court, Nassau County, reinstated.

ROBERT E. KURZIUS, INC., et al., Appellants, v INCORPORATED VILLAGE OF UPPER BROOKVILLE, Respondent.

Second Department, March 26, 1979

SUMMARY

APPEAL from a judgment of the Supreme Court at Special Term (DOUGLAS F. YOUNG, J.), entered May 13, 1977 in Nassau County, which, after a nonjury trial, upheld the validity of that part of a zoning ordinance which created a five-acre minimum lot requirement in certain areas of the Incorporated Village of Upper Brookville which are zoned for residential use.

HEADNOTES

Municipal Corporations — Zoning

1. A five-acre minimum lot requirement in certain portions of a village zoned for residential use is unconstitutional as an unreasonable and improper exercise of the police power inasmuch as it clearly manifests the exclusionary goal of the village's residential zoning; the limitation is against the general public interest since it seeks to limit the number of people living in the village to 1,850. The zoning power may not be used to stop the march of progress and to preserve special benefits for a privileged group of large landowners which consists mainly of present residents of the village, and while the police power involves the protection of the general welfare of the community, the "community" whose welfare must be considered in testing the validity of an application of the zoning power by a local government is not limited to the confines of the geographical subdivision adopting a zoning ordinance but extends to the rights of others in search of a more comfortable place to live as well as to the needs of the region in which the local unit is located.

Municipal Corporations — Zoning

2. Zoning ordinances are susceptible to constitutional challenge only if clearly arbitrary and unreasonable, having no substantial relation to the public health, safety, morals, or general welfare, and the validity of a zoning ordinance depends on the facts of the particular case and whether it is really designed to accomplish a legitimate public purpose.

TOTAL CLIENT-SERVICE LIBRARY® REFERENCES*

67 NY JUR, Zoning and Planning Laws §§ 14 et seq.

82 AM JUR 2d, Zoning and Planning §§ 11-17, 38-46

25 AM JUR PL & PR FORMS (REV), Zoning and Planning, Forms 41-58

8 AM JUR PROOF OF FACTS 2d pp 53 et seq. Unreasonableness of Zoning Restriction

16 Am Jur Trials pp 99 et seq. Relief from Zoning Ordinance

ANNOTATION REFERENCE

Validity of zoning regulations prescribing minimum area for house lots or requiring area proportionate to number of families to be housed. 95 ALR2d 716.

* By the Publisher's Editorial Staff.

APPEARANCES OF COUNSEL

Farrell, Fritz, Caemmerer & Cleary, P. C. (John M. Armentano and *Robert V. Guido* of counsel), for appellants.

Sprague, Dwyer, Aspland & Tobin, P. C. (Joseph L. Tobin, Jr., of counsel), for respondent.

OPINION OF THE COURT

Shapiro, J.

[1] This appeal involves, among other issues, the constitutional validity of a zoning ordinance of the defendant Incorporated Village of Upper Brookville (hereinafter village). Except for a small area along Route 25-A zoned for business, the remainder of the land in the village was zoned for single homes with a minimum lot size of at least two acres in some portions of the village and of at least five acres in the other portions. The plaintiffs are the owners of approximately 50 acres of land which are located within the five-acre minimum lot zone. They attack the zoning of this land on a number of grounds. In our opinion the sole ground which calls for extended consideration is their contention that the five-acre minimum lot zoning is constitutionally invalid. We agree with that contention.

THE FACTS

The village is located in the Town of Oyster Bay. Shortly after its incorporation it adopted a building zone ordinance covering the entire village. That ordinance restricted single-family dwellings to two-acre minimum lots. In 1951 a small part of the village, an area along Route 25-A, was zoned for business. In April, 1959 the village retained Francis Dowd McHugh, an architect specializing in urban and community development, to make a study of the village's zoning and

planning. His studies showed that the area of the village totaled 2,737 acres or approximately four and one-quarter square miles. He testified that when he embarked on his study the village was semirural and largely open. There were then some residences located in several places in the village which were on lots less than two acres in size. There were other residences which were located on lots of from two to five acres. There were several farm areas and some residences with five acres or more of land. The commercial area consisted of only two or three properties. He also testified that the estimated population of the village at the time of his study in 1959 was 900 and that the 1960 census showed a population of slightly more than 1,000. In January, 1976 the population of the village was 1,232. *The witness testified further that on the basis of his study it was his opinion that the village could accommodate a population of about 3,500.*

After being retained by the trustees and the planning board of the village, McHugh had several meetings with them which he described as "constant informal meetings". At one meeting, held on November 30, 1959, he noted that 500 acres in the village were then vacant, and 2,200 acres were used residentially, of which 1,260 were of a "farm and estate character". He then proposed that 1,260 acres be zoned with a two-acre minimum and that the balance be zoned with 5, 10 and 20-acre minimums. The minutes of the meeting reveal that four of the trustees had misgivings as to a 20-acre minimum residential unit surviving a court test. The minutes also indicate that the chairman of the planning board and the mayor of the village "stressed the importance of consulting the large landowners to give them opportunity to express their views and position on any such proposals."

The witness then testified that thereafter he and the mayor, and "usually" the chairman of the planning board, met with some of those landowners (naming three of them) who owned considerable acreage in the village. These meetings were arranged by either the mayor or the chairman of the planning board and were held separately with each of the large landowners. The witness testified that he had not changed his mind concerning the 2, 5, 10 and 20-acre minimums he had proposed but that the people with whom he was meeting "changed their desires to the various types of density."

McHugh also testified that at later meetings the village officials finally decided that the 10 and 20-acre proposal was

"too ambitious" and adjusted it to 8 acres. This was confirmed by the minutes of the meeting of the planning board and board of trustees held on March 13, 1960. At a later meeting of the planning board held on May 11, 1960, it was decided to take no formal steps towards the adoption of the plan proposed by the witness "until further opportunity for study and conference with property owners whose substantial property interests were at stake and upon whose cooperation the Village Board desires to rely." After the May 11 meeting the board of trustees of the village and the planning board announced that a public meeting on the subject would be held on June 15, 1960. The letter announcing the meeting noted that since World War II the village's population had increased to 500 by 1950, had doubled since 1950, that the village was continuing to grow and that if the present two-acre minimum lot zoning prevailed with respect to the entire village it could expect to have an ultimate population of approximately 3,500. The letter also stated that *"the mass majority of the residents would like to see the Village stay exactly as it is."* Under the heading "How Are These Aims To Be Achieved?" the letter stated that this could be done, "[b]y maintaining the present two-acre minimum in * * * [those] sections of the Village which best lend themselves to further development, and by raising the minimum acreage requirement in the least developed and most beautiful areas which at the same time because of their rugged contour are the least appropriate for close development." The letter continued that "It is the belief of the trustees, the Planning Board and our two professional consultants, that the above zoning is about the minimum which can be expected to preserve the rural aspect of the Village as we n[illegible] know it. *It envisages a probable total population of 1,850 people."*

The zoning ordinance which was finally adopted by the village on December 11, 1960 established the following criteria for placing property in a two-acre zone:

"(a) Adjacent areas (of Upper Brookville and a neighboring village) are now so developed or subdivided;

"(b) Topography generally is under 5% slope, without major watercourse, and not necessarily wooded, but is suitable for such development;

"(c) Access (via existing County or State road) is most convenient to the Long Island and the Oyster Bay Expressways; and

"(d) Adjacent areas are now more open uses or they may be retained as 'Reservation' type of use in order to ensure permanent open space for such close development."

The ordinance also established these somewhat different criteria for placing property in the five-acre minimum lot zone:

"(a) Topography generally is rolling; or with slopes over 5% but also with relatively flat plateau suitable for dwelling and farming; wooded areas of native trees and watercourses also are prominent natural features;

"(b) Existing uses are of the same general character, or presently larger estates may suitably be utilized for Suburban estate purposes in future;

"(c) Adjacent areas (within the Village and along its peripheries) generally have similar character, or such areas are now or may reasonably be expected to become permanent open uses; and

"(d) Access to railroad and highway is generally less convenient."

The new five-acre minimum lot zone was called "OP-1" or "Suburban Estate". The ordinance described these terms in the following language: "A modest estate with plots of at least 5 acres per single family dwelling. Generally, such uses are deemed the most desirable and appropriate use of land in the north and central portions of the Village. As shown on the plan map, Suburban Estates also are deemed desirable and appropriate in the following parts of the Village: east of Mill River Road; north of Remsens Lane; and along both Wolver Hollow and Matinecock-Brookville Roads."

In 1968 the corporate plaintiff purchased a parcel of 60 acres in the village. The parcel was then a farm. Ten acres of the parcel were located within the two-acre minimum lot zone and the remaining 50 acres were located within the five-acre OP-1 minimum lot zone. The corporate plaintiff constructed two residences on five-acre plots in the OP-1 portion of the parcel in 1968, one for the use of the individual plaintiffs, Robert and Annemarie Kurzius, and the other for Robert's parents. Robert's father has since died and that home is now owned by his mother, Adele Kurzius, the third individual plaintiff. Title to each of these houses was conveyed to the individual plaintiffs in 1970. The corporate plaintiff also secured subdivision approval for five two-acre lots on the two-

acre minimum lot portion of the parcel and for nine five-acre lots on the remaining portion. The corporate plaintiff then partially improved all of the lots by providing drainage for them and constructing roads. Thereafter the corporate plaintiff constructed and sold five houses on the two-acre minimum lot portion of the parcel.

In April, 1974 the plaintiffs brought this declaratory judgment action seeking a ruling that the five-acre zoning ordinance was unconstitutional.

At the trial, the plaintiffs attacked the ordinance on the ground that it had been adopted in disregard of the comprehensive master plan adopted by the village on October 11, 1960, two months prior to the adoption of the ordinance. A second ground of attack was that the plaintiffs' property had been improperly classified under the standards established in the ordinance for two-acre minimum lot and five-acre minimum lot zones in that its topography did not conform to the requirements for the OP-1 zone, that is, it was not rolling, did not have a slope of over 5%, was not wooded and had no watercourse. Plaintiffs also submitted evidence to support their claim that they were unable to sell any of the five-acre lots contained in the 50 acres in that zone and that, therefore, the ordinance was confiscatory as applied to those 50 acres. Plaintiffs' final argument was that the ordinance, insofar as it imposed five-acre minimum lot zoning on a portion of their property, was an abuse of the police power since it did not serve the public welfare nor meet the standards contained in sections 7-700 and 7-704 of the Village Law and that therefore it was unconstitutional.

Section 7-700 of the Village Law provides in relevant part:

"Grant of power.

"For the purpose of promoting the health, safety, morals, or the general welfare of the community, the board of trustees of a village is hereby empowered, by local law, to regulate and restrict the height, number of stories and size of buildings and other structures, the percentage of lot that may be occupied, the size of yards, courts and other open spaces, the density of population, and the location and use of buildings, structures and land for trade, industry, residence or other purposes."

Section 7-704 provides:

"Purposes in view.

"Such regulations shall be made in accordance with a

comprehensive plan and designed to lessen congestion in the streets; to secure safety from fire, panic, floods and other dangers; to promote health and the general welfare; to provide adequate light and air; to prevent the overcrowding of land; to avoid undue concentration of population, to facilitate the adequate provision of transportation, water, sewerage, schools, parks and other public requirements. Such regulations shall be made with reasonable consideration, among other things, as to the character of the district and its peculiar suitability for particular uses, and with a view to conserving the value of buildings and encouraging the most appropriate use of land throughout such municipality."

It is our view that the only ground which requires consideration is the one which attacks the five-acre zoning as arbitrary and unreasonable because it has no substantial relation to the public health, safety, morals or general welfare.

[2] In *Berenson v Town of New Castle* (38 NY2d 102, 107) the Court of Appeals pointed out that the Legislature authorized local boards, " '[f]or the purpose of promoting the health, safety, morals, or the general welfare of the community,' to adopt zoning ordinances regulating and restricting, among other things, 'the height, number of stories and size of buildings and other structures,' the size of building lots and the over-all population density. (Town Law, § 281.)" [Section 7-700 of the Village Law tracks the language of the Town Law quoted above and as to density, declares that the board of trustees of a village is empowered by local law, to regulate "the density of population, and the location and use of buildings, structures and land for trade, industry, residence or other purposes".] The court in *Berenson* then said (p 107): "Zoning ordinances are susceptible to constitutional challenge only if 'clearly arbitrary and unreasonable, having no substantial relation to the public health, safety, morals, or general welfare.' *(Euclid v Ambler Co.,* 272 US 365, 395; *Matter of Diocese of Rochester v Planning Bd. of Town of Brighton,* 1 NY2d 508, 522.) Thus, it necessarily follows that the validity of a zoning ordinance depends on the facts of the particular case and whether it is 'really designed to accomplish a legitimate public purpose.' *(Matter of Wulfsohn v Burden,* 241 NY 288, 299.)"

In *Berenson* the Court of Appeals had to determine the

propriety, under the above standard, of a zoning ordinance which entirely barred multiple dwellings from a community. Before dealing with that problem, the court said (p 108): "In 1959, we sustained the validity of a village minimum lot requirement. *(Levitt v Incorporated Vil. of Sands Point,* 6 NY2d 269.) The court ruled that a reasonableness requirement was satisfied since the village was in an 'isolated geographical position in a fringe area on the northern tip of a peninsula'. Moreover, the district itself consisted of 'rolling and partly wooded land in an attractive *rural* residential community.' (6 NY2d, at p 272 [emphasis in original].)" It then stressed the limited impact of that holding (p 108): "We stated that the enactment of a two-acre minimum lot requirement might, in an *appropriate* case, be a legitimate exercise of the police power. Significantly, the lot size requirement did not extend throughout the village itself, but only applied within one residential district." (Emphasis supplied.) The *Berenson* court also said that while it had ruled in *Matter of Golden v Planning Bd. of Town of Ramapo* (30 NY2d 359, 376, app dsmd 409 US 1003) that a town may adopt a program providing for phased growth, "we were careful to note that 'community efforts at immunization or exclusion' would not be countenanced."

The Court of Appeals further declared in *Berenson* (pp 108-109): "New York is not the only urban State to confront the issue presented here. As in our own State, however, the results have been mixed. The Supreme Courts of Pennsylvania and New Jersey have struck down exclusionary zoning ordinances. *(Appeal of Girsh,* 437 Pa 237; *Southern Burlington County NAACP v Township of Mount Laurel,* 67 NJ 151, app dsmd 423 US 808.) A Michigan court has taken a similar position *(Bristow v City of Woodhaven,* 35 Mich App 205, 218-219.) The New Jersey and Pennsylvania cases involved minimum lot requirements, similar to the New Castle ordinance, whereas the Michigan case involved a prohibition on the use of mobile homes. On the other hand, in three States, it has been held permissible to exclude business structures from the community where adequate commercial services may be readily obtained in nearby communities. *(Valley View Vil. v Proffett,* 221 F2d 412 [STEWART, J.] [case involved a zoning ordinance of an Ohio village]; *Cadoux v Planning & Zoning Comm. of Town of Weston,* 162 Conn 425, cert den 408 US 924; *McDermott v Village of Calverton Park,* 454 SW2d 577

[Mo].) In one Federal case, the court sustained the validity of New Hampshire village's minimum acreage requirement, at least as a temporary measure. *(Steel Hill Development v Town of Sanbornton,* 469 F2d 956, 962.) Florida courts have upheld the validity of exclusionary zoning provisions without any qualifications. *(Blank v Town of Lake Clarke Shores,* 161 So 2d 683 [Fla]; *Gautier v Town of Jupiter Is.,* 142 So 2d 321 [Fla].)" By including among the cases it cited on the issue of exclusionary zoning those which involved minimum lot requirements the *Berenson* court recognized that the use of minimum lot requirements in zoning ordinances might well involve exclusionary practices.

The court also dealt with a second aspect of the application of the police power to zoning ordinances when it said that in enacting a zoning ordinance, "consideration must be given to regional needs and requirements." In discussing such needs and requirements it noted (p 110): "There must be a balancing of the local desire to maintain the *status quo* within the community *and the greater public interest that regional needs be met"* (emphasis supplied). The court in *Berenson* concluded its discussion of the need of zoning ordinances to "foster the development of programs designed to achieve sound regional planning" with the following trenchant statement (p 111): "While the people of New Castle may fervently desire to be left alone by the forces of change, the ultimate determination is not solely theirs. Whether New Castle should be permitted to exclude high density residential development depends on the facts and circumstances present in the town and the community at large. Until the day comes when regional, rather than local, governmental units can make such determinations, the courts must assess the reasonableness of what the locality has done."

[1] An examination of the testimony of the planning expert retained by the village in the instant case to draw up a comprehensive plan and to set up various minimum lot zoning districts makes it clear that the decision to create the five-acre minimum lot zoning area, added by the 1960 amendment to the zoning ordinance, reflected the desire of those responsible for that ordinance "to be left alone by the forces of change" and thereby to exclude from a large part of the village anyone who could not afford to purchase a minimum of five acres and build a home appropriate for such a large lot. In this connection it is noteworthy that the term used by the village for

residences located on two-acre minimum lots is "close development."

The decision in *Berenson v Town of New Castle* (38 NY2d 102, *supra)* was foreshadowed by *Matter of Golden v Planning Bd. of Town of Ramapo* (30 NY2d 359, 369, *supra).* In that case the court dealt with an attempt to use the zoning power "to provide an over-all program of orderly growth and adequate facilities through a sequential development policy commensurate with progressing availability and capacity of public facilities." The court rejected as "antiquated" the notion that "the regulation of land use and development is uniquely a function of local government—that the public interest of the State is exhausted once its political subdivisions have been delegated the authority to zone." The court said (p 374): "Experience, over the last quarter century, however, with greater technological integration and drastic shifts in population distribution has pointed up serious defects and community autonomy in land use controls has come under increasing attack by legal commentators, and students of urban problems alike because of its pronounced insularism and its correlative role in producing distortions in metropolitan growth patterns, and perhaps more importantly, in crippling efforts toward regional and State-wide problem solving, be it pollution, decent housing, or public transportation (ALI, A Model Land Development Code [Tent. Draft No. 2, April 24, 1970], Intro. Mem., p. xv, citing Report of National Comm. on Urban Problems [Douglas Comm.], Building the American City [1969]; see, also, New York State Planning Law Revision Study, Study Doc. No. 4 [New York State Office of Planning Coordination, Feb., 1970])."

The court went on to say (p 375): "There is, then, something inherently suspect in a scheme which, apart from its professed purposes, effects a restriction upon the free mobility of a people until sometime in the future when projected facilities are available to meet increased demands. Although zoning must include schemes designed to allow municipalities to more effectively contend with the increased demands of evolving and growing communities, under its guise, townships have been wont to try their hand at an array of exclusionary devices in the hope of avoiding the very burden which growth must inevitably bring (see *National Land & Inv. Co. v Easttown Twp. Bd. of Adj.,* 419 Pa. 504, 532, *supra; Girsh Appeal,* 437 Pa. 237; *Concord Twp. Appeal,* 439 Pa. 466, *supra;* see,

also, Roberts, Demise of Property Law, 57 Cornell L. Rev. 1, 5)."

Also noteworthy are the following comments in *Golden* (pp 377-379):

"It is the nature of all land use and development regulations to circumscribe the course of growth within a particular town or district and to that extent such restrictions invariably impede the forces of natural growth *(Euclid v Ambler Co.,* 272 U. S. 265, *supra; National Land & Inv. Co. v Easttown Twp. Bd. of Adj.,* 419 Pa. 504, 532, *supra).* Where those restrictions upon the beneficial use and enjoyment of land are necessary to promote the ultimate good of the community and are within the bounds of reason, they have been sustained. *'Zoning [,however,] is a means by which a governmental body can plan for the future—it may not be used as a means to deny the future' (National Land & Inv. Co. v Easttown Twp. Bd. of Adj.,* 419 Pa. 504, 528, *supra).* Its exercise assumes that development shall not stop at the community's threshold, but only that whatever growth there may be shall proceed along a predetermined course *(Euclid v Ambler Co.,* 272 U.S. 365, 387, *supra).* It is inextricably bound to the dynamics of community life and its function is to guide, not to isolate or facilitate efforts at avoiding the ordinary incidents of growth. *What segregates permissible from impermissible restrictions, depends in the final analysis upon the purpose of restrictions and their impact in terms of both the community and general public interest* (see *Euclid v Ambler Co.,* 272 U.S. 365, 387, *supra).* The line of delineation between the two is not a constant, but will be found to vary with prevailing circumstances and conditions (see, e.g., *Euclid v Ambler Co.,* 272 U.S. 365, 387, *supra; Rodgers v Village of Tarrytown,* 302 N.Y. 115, *supra).*

"What we will not countenance, then, under any guise, is community efforts at immunization or exclusion. But, far from being exclusionary, the present amendments merely seek, by the implementation of sequential development and times growth, to provide a balanced cohesive community dedicated to the efficient utilization of land. The restrictions conform to the community's considered land use policies as expressed in its comprehensive plan and represent a bona fide effort to maximize population density consistent with orderly growth.

* * *

"Perhaps even more importantly, time growth unlike the

minimum lot requirements recently struck down by the Pennsylvania Supreme Court as exclusionary, does not impose permanent restrictions upon land use (see *National Land & Inv. Co. v Easttown Twp. Bd. of Adj.*, 419 Pa. 504, *supra; Concord Twp. Appeal,* 439 Pa. 466, *supra)*" (emphasis supplied).

It is clear that in *Golden v Planning Bd. of Town of Ramapo* (30 NY2d 359, *supra)* and in *Berenson v Town of New Castle* (38 NY2d 102, 109, *supra)* the Court of Appeals elected to follow the enlightened views of the Supreme Courts of Pennsylvania and New Jersey with respect to minimum lot zoning rather than the *status quo* views of Florida which "have upheld the validity of exclusionary zoning provisions without any qualifications." Here, unlike *Levitt v Incorporated Vil. of Sands Point* (6 NY2d 269, *supra)* the record demonstrates that the five-acre zoning minimum clearly manifests the exclusionary goal of the village's residential zoning. This minimum area provision is an intrinsic and essential part of the village's misuse of the zoning power to limit the number of people living in the village to 1850. It is therefore, clear that this limitation is against the general public interest.

The record demonstrates beyond peradventure of doubt that the leaders of the village, after consulting with some of the large landowners, decided to use their zoning power to preserve the village as a citadel of privilege. Thus their zoning power was not being used as a proper exercise of the police power to serve the general welfare but rather to stop the march of progress and to preserve special benefits for the privileged group of large landowners which consists mainly of present residents of the village.

While the police power involves the protection of the general welfare of the community *(Dauernheim v Town Bd. of Town of Hempstead,* 33 NY2d 468, 473) the Court of Appeals in both *Golden v Planning Bd. of Town of Ramapo* (30 NY2d 359, 375, *supra)* and *Berenson v Town of New Castle* (38 NY2d 102, 111, *supra),* has made it clear that the "community" whose welfare must be considered in testing the validity of an application of the zoning power by a local government is not limited to the confines of the geographical subdivision adopting a zoning ordinance but extends to the rights of others in

search of a more confortable place to live as well as to the needs of the region in which the local unit is located.*

The village contends that here, unlike *National Land & Inv. Co. v Easttown Twp. Bd. of Adj.* (419 Pa 504), the zoning ordinance's primary purpose was not to prevent the entry of newcomers but merely to avoid future burdens, economic and otherwise, upon the administration of public services and facilities. In answer, it need merely be pointed out that exclusion of newcomers includes both selective admission as well as total exclusion (see *Township of Willistown v Chesterdale Farms,* 462 Pa 445, 449). As the Pennsylvania Supreme Court said in *Township of Willistown* (citing *Concord Township Appeal,* 439 Pa 466) " 'The implication of our decision in National Land [419 Pa. 504, 215 A.2d 597 (1965)] is that communities must deal with the problems of population growth. They may not refuse to confront the future by adopting zoning regulations that effectively restrict population to near present levels * * * It is not for any given township to say who may or may not live within its confines, while disregarding the interests of the entire area.' "

In an effort to justify the exclusionary aspects of imposing five-acre minimum lot zoning on a substantial portion of the unused land, the village argues that it was seeking to preserve open space. Based on the record in this case that contention is nothing but a makeweight argument to support the exclusionary effect of its zoning ordinance which was clearly designed to stop proper growth (see *Oakwood at Madison v Township of Madison,* 72 NJ 481).

We are fully aware of the line of authority which declares that upon parties who attack a zoning ordinance rests the burden of showing that the regulation assailed is not justified under the police power of the State or by any reasonable interpretation of the facts *(Shepard v Village of Skaneateles,* 300 NY 115, 118). We are also aware that in any area of even

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* Implied in both *Golden (supra)* and *Berenson (supra)* is the truism that zoning power, an exercise of the police power of the State, is to be used to protect and preserve the common weal, not the private interest of individual property owners or even of a local community. If an individual property owner or a group of such owners wish to preserve the sparsely inhabitated rural nature of their property they are, of course, free to do so by voluntary association for that purpose. They may not, however, under our system of constitutional government which guarantees equal protection of the laws to all persons, invoke the compulsion of State power by the use of a zoning ordinance to achieve that goal at the expense of other property owners and would-be inhabitants of the community.

moderate density, comprehensive and balanced zoning is essential to the health, safety and welfare of the community and that the task of achieving this goal devolves upon the local legislative body, and that its judgment must be allowed to control if the classification is fairly debatable *(Thomas v Town of Bedford,* 11 NY2d 428, 433; *Rodgers v Village of Tarrytown,* 302 NY 115, 121, *supra; Euclid v Ambler Co.,* 272 US 365, 388, *supra).* However, as we have noted, under the undeniable facts in this case, the plaintiffs have met that burden for it is clear that the ordinance before us was adopted to preserve the present by denying the future. No longer may governmental agencies retain the benefits of, or hereafter adopt, discriminatory, exclusionary or selective zoning ordinances which are designed solely to protect the interests of their more affluent residents by turning a blind eye and a deaf ear to the plight of the less fortunate of their own, or their regions' residents.

The judgment appealed from should therefore be reversed and a declaration should issue that that part of the zoning ordinance which creates a five-acre minimum lot requirement in certain portions of the village zoned for residential use is unconstitutional because it constitutes an unreasonable and an improper exercise of the police power. We limit our declaration to the five-acre zoning minimum because that is the only relief requested by plaintiffs.

HOPKINS, J. P., GULOTTA and MARTUSCELLO, JJ., concur.

Judgment of the Supreme Court, Nassau County, entered May 13, 1977, reversed, on the law and the facts without costs or disbursements, and it is declared that that part of the zoning ordinance which created a five-acre minimum lot requirement in certain areas of the Incorporated Village of Upper Brookville which are zoned for residential use is unconstitutional as an unreasonable and improper exercise of the police power.

Remittitur

COURT OF APPEALS
STATE OF NEW YORK

The Hon. Lawrence H. Cooke, Chief Judge, Presiding.

2 No. 465

Robert e. Kurzius, Inc. & ors.,
Respondents

v.

Incorporated Village of Upper Brookville,
Appellant.

The appellant in the above entitled appeal appeared by Sprague, Dwyer, Aspland & Tobin; the respondents appeared by Farrell, Fritz, Caemmerer & Cleary.

The Court, after due deliberation, orders and adjudges that the order is reversed, with costs, and the judgment of Supreme Court, Nassau County, reinstated. Opinion by Gabrielli, J. All concur.

The Court further orders that the papers required to be filed and this record of the proceedings in this Court be remitted to the Supreme Court, Nassau County, there to be proceeded upon according to law.

I certify that the preceding contains a correct record of the proceedings in this appeal in the Court of Appeals and that the papers required to be filed are attached.

/s/
Joseph W. Bellacasa, Clerk
of the Court.

Court of Appeals, Clerk's Office, Albany
November 20, 1980

No. 80-1372

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ALEXANDER L. ST
CLERK

IN THE

Supreme Court of the United States

OCTOBER 1980 TERM

ROBERT E. KURZIUS, INC., ROBERT E. KURZIUS, ANNEMARIE KURZIUS and ADELE S. KURZIUS,

Petitioners,

against

INCORPORATED VILLAGE OF UPPER BROOKVILLE,

Respondent.

RESPONDENT'S BRIEF IN OPPOSITION

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Question Presented

Whether a village ordinance, adopted eight years before a property owner acquires title to property in the village, is unconstitutional on its face per se merely because it prescribes a five acre minimum plot for each dwelling.

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Statement of the Case

In December 1960, the respondent enacted a zoning ordinance which, among other things, limited construction of dwellings in certain areas to plots two acres in area, and in others five acres in area. (9a - 10a)

In 1968 the corporate petitioner purchased a parcel of land in the village containing about sixty acres, of which ten acres were in a two acre zone, the balance in a five acre zone.

The corporate petitioner subsequently prepared, filed and had approved a development map for the entire parcel. It built and sold out the entire two-acre subdivision, and built dwellings on two of the five acre parcels which were then conveyed to persons connected with the principals

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Unless otherwise indicated, numbers in parentheses refer to pages in the record below.

in the corporate plaintiff. (Petition for Writ, p. 5)

Without attempting to seek a change of zone, a variance, or other relief, the petitioners in April 1974 commenced a declaratory judgment suit seeking a judgment declaring the ordinance as applied to their property unconstitutional for various reasons. (29a - 33a)

After a bench trial, the Supreme Court adjudged that the ordinance was valid. The Appellate Division, agreeing that none of the other objections to the ordinance was proven, reversed Trial Term on the sole ground that a five acre limit on a residential plot in any part of the Village was per se unconstitutional as a matter of law. Kurzius v. Inc. Village of Upper Brookville, 67 AD 2d 70, 71, 76, 83. (Appendix to Petition)

The Court of Appeals, agreeing that

the only question to be determined was whether the five acre zoning was exclusionary per se and an impermissible exercise of the police power, reversed the Appellate Division and held that the five acre zoning was not exclusionary per se, and that it was not exclusionary but valid as a matter of fact and law. Kurzius v. Inc. Village of Upper Brookville, 51 N.Y.2d 338, 343, 346. (Appendix to Petition).

Petitioners in this Court now attempt to attack the ordinance as unconstitutional, not as applied to their property, but per se, because it is exclusionary and an improper exercise of the police power. (Petition, p (i), 20, 49)

POINT I

THE PETITIONERS LACK STANDING TO CHALLENGE THE ORDINANCE AS "EXCLUSIONARY" BECAUSE THEY HAVE NOT BEEN EXCLUDED FROM THE VILLAGE, AND BECAUSE THEY CANNOT SATISFY THE PRUDENTIAL PRINCIPLES ESTABLISHED BY THIS COURT.

It is fundamental to the jurisdiction of this Court to grant certiorari that the petitioners have standing to make the application, and that question must be addressed first even if not raised below.

Duke Power Co. v. Carolina Environmental Study Group
438 U.S. 59, 68

Roe v. Wade, 410 U.S. 113, 124, 125

The corporate petitioner has been a landowner in the village since 1968. The individual petitioners have been residents since 1970 after purchase of their properties, in one way or another, from the corporate petitioner. The ordinance had been in effect for eight years before the

latter purchased its property. None of the petitioners has been "excluded". Therefore their attempted attack on the ordinance as "exclusionary" is not being mounted in their own behalf, but on behalf of some imaginary group which has been or may be unable to afford to purchase land in the village. This is not constitutionally permissible.

U.S. Const., Art III, Sec. 2

Duke Power Co. v. Carolina Environmental Study Group
438 U.S. 59, 71

Warth v. Seldin
422 U.S. 490, 498, 499

Arlington Heights v. Metropolitan Housing Dev. Corp.
429 U.S. 252, 260, 261, 263

Even if the Court should find that petitioners technically have standing, they should be denied standing to assert the "exclusionary" claim under the facts of this case prudentially, as not being best

suited to present the claim of others for adjudication, because they have not been excluded.

> Gladstone Realtors v. Village of Bellwood
> 444 U.S. 91, 99 S. Ct. 1601, 1608

But the question of standing aside, the New York Court of Appeals has expressly found that the ordinance is valid, and not exclusionary in fact or per se.

> "[1,2] A zoning ordinance will be invalidated on both constitutional and State statutory grounds if it was enacted with an exclusionary purpose, or it ignores regional needs and has an unjustifiably exclusionary effect (Matter of Golden v. Planning Bd. of Town of Ramapo, supra; Berenson v. Town of New Castle, supra). However, in this case, because there was insufficient and, indeed, a complete absence of proof of regional needs or a discriminatory purpose and no proof that the zoning ordinance in question has excluded or will exclude persons having a need for housing within the municipality or within the region, the issues are narrowed to the questions of whether five-acre zoning is

exclusionary per se and an impermissible exercise of the police power***."

* * * * *

"Absent a showing by plaintiff of an exclusionary purpose behind a zoning ordinance, or that the zoning authority had failed to meet the criteria set forth in Berenson, the presumption of constitutionality which accompanies the legislative act must prevail unless the ordinance is without a doubt facially invalid. Based upon the record before us, we cannot say that the ordinance in question was an unreasonable and improper exercise of the police power, or beyond the power delegated by section 7-704 of the Village Law."

"Although some courts have asseredly found multiacre zoning to be per se exclusionary and thus invalid (Developments in the Law-Zoning, 91 Harv L Rev 1427, 1641) we do not so hold because of what we perceive to be legitimate purposes of such zoning (see Agins v City of Tiburon, ___US___, 100 S Ct 2138, supra; Levitt v Incorporated Vil. of Sands Point, 6 NY2d 269). In regard to a related question, the Supreme Court has noted that '[a] quiet place where yards are wide, people few, and motor vehicles

> restricted are legitimate guidelines in a land-use project addressed to family needs' (Village of Belle Terre v Boraas, 416 US 1, 9). Although environmental factors may justify large-lot zoning, we do not hold that this type of zoning is permissible without qualification, because minimum lot requirements may involve exclusionary practices." (51 N.Y.2d 338, at 343 and 346. (Appendix to Petition - Emphasis added.)

In short, the New York Court of Appeals found that petitioners completely failed to prove their case on any of the theories propounded in their attempt to invalidate the ordinance.

POINT II

THE ONLY FEDERAL QUESTION PRESENTED ON THIS APPLICATION IS WHETHER A FIVE ACRE AREA ZONING LIMITATION FOR BUILDING PLOTS IS ON ITS FACE UNCONSTITUTIONAL, AND THERE IS NO PERSUASIVE SHOWING THAT THIS COURT SHOULD UNDERTAKE THE ADJUDICATION OF THE QUESTION.

Although the petitioners assert that the constitutional questions involved in this application are deprivation of property without due process or compensation in violation of the 5th and 14th amendments, (Petition, p.p. 2 and 3) they tender no such issue to this Court. All they present is an invitation to the Court to declare that five acre zoning anywhere is unconstitutional per se, without regard to the surrounding facts and circumstances. The New York Court of Appeals in this case has explicitly refused to make such a

declaration. Such a rule of law has never been laid down by this Court (or any Federal Court, so far as we know) and the invitation should be refused. To impose such a rule by judicial fiat would be an improper and arbitrary interference with legislative process, and would fly in the face of this Court's established guidelines in zoning matters.

Ever since Euclid v. Ambler Co., 272 U.S. 365, this Court has recognized the validity and desirability of zoning control of land use. The Court has also understood, as does the New York Court of Appeals, that zoning enactments result from the balancing of numerous compelling considerations, and that courts should refrain from reviewing the merits of legislative decisions, absent a showing of arbitrariness or irrationality.

Arlington Heights v. Metro. Housing Dev. Corp.
429 U.S. 252, 265

Village of Belle Terre v. Boraas
416 U.S. 1, 9

Shepard v. Village of Skaneatelas
300 N.Y. 115, 118

The Court agrees with the state courts that the legislative enactment enjoys a strong presumption of constitutionality, and that one who attacks the legislation carries a very heavy burden of proof.

Huntington v. Park Shore Country Day Camp, 47 N.Y.2d 61, 65

Marcus Associates v. Town of Huntington, 45 N.Y.2d 501, 505

Berenson v. Town of New Castle
38 N.Y.2d 102, 107

Goldblatt v. Town of Hempstead
369 U.S. 590

Bibb v. Navajo Freight Lines
359 U.S. 520

The Court has further concluded that restrictions to residential use and the preservation of open space are legitimate

objects of zoning control and promote the general welfare, even though enacted after the purchase of the affected land.

Village of Belle Terre v. Boraas
416 U.S. 1, 9

Penn Central Tr. Co. v. New York
438 U.S. 104, 129

Agins v. City of Tiburon, ___U.S. ___, 100 S. Ct. 2138, 2142

The ordinance had been in effect for eight years when the corporate petitioner entered the village and purchased its property, which was zoned partly for two acres and the rest for five acres. It mapped the entire property, and sold all the two acre plots. It has sold two of the five acre plots. The petitioner is free to pursue its legitimate investment expectations by building on and selling its five acre lots. Although it made some attempt at trial to show that it could not economically build and sell on five acre plots, the trial

court found there was no convincing proof of that. The corporate petitioner then abandoned that line of attack, and in both appellate courts below (and on this application) attacked the ordinance solely as unconstitutional, not as applied to petitioner's property, but facially and per se as to all the property in the Village or anywhere else zoned for five acres, simply because the area limitation was five acres.

The cases cited by the petitioners as suggesting a review by this Court of the New York Court of Appeals' refusal to declare five acre zoning unconstitutional per se, either involved completely dissimilar facts, or did not make a per se determination.

Board of Supervisors v. Carper, 200 Va. 653, involved a rezoning of two-thirds of the County of Fairfax from one half acre to two acres. Fairfax County contains over

400 square miles, or 258,000 acres. The whole village herein contains 2737 acres.

In National Land v. Kohn, 215 A2d 597, 607, 608, the Pennsylvania court refused to hold that any particular area limitation was invalid per se:

> "Every zoning case involves a different set of facts and circumstances in light of which the constitutionality of a zoning ordinance must be tested. Therefore, it is impossible for us to say that any minimum acreage requirement is unconstitutional per se."

The zoning was invalidated because the property was upzoned while the developer was in the process of seeking subdivision approval, and was an attempt to overcome the population explosion.

In Appeal of B-K Properties, 405 A2d 1083, the court sustained a five acre lot requirement, and in De Caro v. Washington Township, 344 A2d 725, 728, the court reiterated its conclusion that "minimum

lot sizes are not unconstitutional per se."

Appeal of Kit-Mar Builders, Inc., 439 Pa. 466, did not involve a per se invalidation based on area, but on the facts of the case the ordinance was invalidated as "unreasonable".

In County Commissioners of Queen Anne's County v. Miles, 228 A2d 450, the Maryland Court of Appeals sustained a five acre lot minimum.

In Steel Hill Development, Inc. v. Town of Sanbornton, 469 F2d 956, the six acre zoning was upheld, and there was no per se ruling. Although the court was disturbed by the fact that there was no professional study made on which to base the acreage limitation enacted to protect the values cherished by the people of the town, it recognized that a balance could be struck between the ecological and population pressures. In contrast, the ordinance

involved here was adopted after an eighteen months study by a professional planner. The New York Court of Appeals expressly found that there was no proof the ordinance violated the balancing and other tests established by that court in Berenson v. Town of New Castle, 38 N.Y.2d 102. (Kurzius v. Village of Upper Brookville, 51 N.Y.2d 338, 342, 345, 346 - Appendix to Petition). The dicta of the Steel Hill court expressing its "serious worries" over the motivation of the town meeting does not call for any review.

The arguments in Point III of the petitioners' brief directed to the proposition that the ordinance in question was adopted in violation of the New York Village Law should not long detain this Court. The New York Court of Appeals has expressly found to the contrary (Kurzius v. Village of Upper Brookville, 51 N.Y.2d 338,

346, 347 - Appendix to Petition). That interpretation and application of state law does not present a federal question reviewable by this Court.

Patterson v. Colorado,
205 U.S. 454, 461

Agins v. City of Tiburon,
100 S.Ct. 2138, 2141

The ordinance involved in this petition is not graven in stone. It may well be amended in the future, and facts and circumstances not now existing may at some time compel an amendment by judicial direction, even if the legislative body does not initiate a revision. The New York Court of Appeals has declared that this ordinance is not exclusionary, and that it will not tolerate any zoning ordinance which is found to be exclusionary as a matter of fact. No further judicial review is necessary or justified.

CONCLUSION

FOR ANY AND ALL OF THE FOREGOING REASONS, CERTIORARI SHOULD BE DENIED.

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Respectfully submitted,

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